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Chapter 7 Trustee

7 UNITED STATES BANKRUPTCY COURT
8 EASTERN DISTRICT OF WASHINGTON
9

10 In re:

11 MASINGALE, MONTE L. &
12 ROSANA D.,

13 Debtor(s).
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Case No. 15-03276-FPC7

Chapter 7

CHAPTER 7 TRUSTEE'S MOTION
FOR ORDER DIRECTING THE
CANCELLATION OF MORTGAGE
RECORDED IN VIOLATION OF
AUTOMATIC STAY AND
EXTINGUISHING LIEN AGAINST
REAL PROPERTY SALE PROCEEDS

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19 **I. MOTION**

20 The Chapter 7 Trustee, John D. Munding, of Munding, P.S. (the "Trustee"), on
21 behalf of the Chapter 7 Bankruptcy Estate of Monte L. & Rosana D. Masingale,
22 ("Bankruptcy Estate") moves the Court for an order declaring the cancellation and
23 extinguishment of that certain Mortgage dated August 31, 2021 ("Mortgage") executed
24 by the debtor Rosana D. Masingale in favor of Southwell & O'Rourke, P.S., which was
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1 recorded as a post-petition lien against the real property commonly known as 19716 E.
2 8th Avenue, Greenacres, WA 99016 ("Real Property") on September 1, 2021 (the
3 "Motion"). Specifically, the Motion seeks an order:
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5 1. Declaring the Real Property to be property of the Bankruptcy Estate pursuant
6 to 11 U.S.C. §541.

7 2. Finding that the recording of the Mortgage was a violation of the automatic
8 stay imposed by 11 U.S.C. §362(a).
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10 3. Cancelling and declaring the Mortgage null and void pursuant to 11 U.S.C.
11 §362, or
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13 4. Extinguishing all liens and encumbrances created by the Mortgage against the
14 Real Property and subsequent net proceeds of sale pursuant to 11 U.S.C. §549.

15 In further support of the Motion to Cancel and Extinguish, the Trustee states as
16 follows:
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18 **II. BASIS, TERMS, AND CONDITIONS**

19 **A. Jurisdiction and Venue**

20 1. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§
21 157 and 1334. This proceeding is a core proceeding pursuant to 28 U.S.C. §
22 157(b)(1)(A), (N). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and
23 1409. The Trustee consents to the Court entering final orders with respect to the relief
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1 requested in the Motion.

2 **B. Legal Basis**

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4 2. The Debtors filed a voluntary Chapter 11 petition in this proceeding on
5 September 28, 2015. (ECF No. 1).

6 3. On November 19, 2018 the case was converted to a chapter 7 (ECF No
7 356) and John D. Munding was appointed as the Chapter 7 trustee (ECF No. 357-2).
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9 4. The title to the Real Property was vested in the Bankruptcy Estate, more
10 specifically the Trustee, as of November 19, 2018 under 11 U.S.C. §541.

11 5. On September 28, 2015 the law firm of Southwell & O'Rourke, P.S.
12 sought to be and was subsequently approved as counsel for the debtors. (ECF No. 10).
13 The law firm of Southwell & O'Rourke, P.S. subsequently applied for an award of
14 attorney fees and reimbursement of expenses. (ECF No. 377). The Application for
15 Employment and the Application for Attorney Fee and Expenses did not disclose as
16 required by Rule 2016 (b) that the payment of Southwell & O'Rourke's fees and costs
17 was to be secured by a subsequent Mortgage against the Real Property. (ECF No. 377,
18 Local Form 2016A).
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22 6. On August 31, 2021, the debtor Rosana Masingale executed a Mortgage in
23 favor of Southwell & O'Rourke, P.S. to secure payment of the sum of \$53,225.90 for
24 legal services rendered after November 19, 2018. *Decl. Trustee Munding, Ex. A.* The
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1 Mortgage was recorded as a lien against the Real Property on September 1, 2021.
2 Southwell & O'Rourke, P.S. did not seek relief from the automatic stay imposed under
3 11 U.S.C. §362 to encumber the Real Property. *Judicial Notice of Docket Requested.*
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5 The action of recording the Mortgage against the Real Property was a violation of the
6 automatic stay.

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8 7. Despite the debtor Rosana Masingale filing with the court a motion to sell
9 the Real Property (ECF No. 467) and subsequently filing a motion to direct
10 abandonment of the Real Property (ECF Nos. 483-485), the debtor Rosana Masingale
11 did not disclose the existence of the Mortgage as an encumbrance against the Real
12 Property to the Trustee or the Court.

14 8. On January 31, 2022, the Court entered the Order Denying Debtor's
15 Motion for Order Directing Abandonment of Property and Granting Trustee's Motion
16 to Sell Property ("Order Re Sale"), specifically the Real Property. (ECF No. 536).

18 9. On or about March 2, 2022, through review of the Preliminary Title Report
19 issued by Spokane County Title Company, the Trustee discovered the Mortgage as a
20 lien against the Real Property. *Decl. Trustee Munding.*

22 10. The Trustee subsequently requested that Southwell & O'Rourke
23 voluntarily cancel the Mortgage and remove the same from being a cloud against title
24 to the Real Property. Southwell & O'Rourke declined to remove the Mortgage. *Decl.*
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1 *Trustee Munding.*

2 11. On April 8, 2022, the Trustee sold the Real Property pursuant to the
3 Court's prior Order Re Sale and received net sale proceeds of \$222,783.34. (ECF No.
4 550).
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6 12. Southwell & O'Rourke, P.S. continues to assert that it has a valid and
7 enforceable lien against the net sale proceeds as a result of its Mortgage being recorded
8 against the Real Property. The Trustee disputes Southwell & O'Rourke, P.S.'s
9 contentions as the Mortgage is null and void pursuant to 11 U.S.C. 362 and avoidable
10 pursuant to 11 U.S.C. §549.
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13 **III. LEGAL ANALYSIS**

14 The Real Property was property of the Bankruptcy Estate as of September 1,
15 2021 pursuant to 11 U.S.C. §541. The recording of the Mortgage as a lien against the
16 Real Property on September 1, 2021 was a violation of the automatic stay imposed by
17 Section 326 (a). Under Section 362(a), the filing of a bankruptcy petition operates as
18 an automatic stay of "any act to create, perfect, or enforce any lien against property of
19 the estate." 11 U.S.C. 362 (a) (4). The recording of the Mortgage post-petition is
20 such an act and constitutes a violation of the automatic stay.
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23 Section 362 provides remedies for violations of the automatic stay. The Ninth
24 Circuit has held that actions taken in violation of the stay are void ab initio. *Schwartz*
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1 v. *United States (In re Schwartz)*, 954 F.2d 569, 571-72 (9th Cir. 1992) (“[Absent
2 affirmative relief from the Bankruptcy Court, violations of the stay are void”). As a
3 matter of Ninth Circuit law, the recording of the Mortgage against the Real Property is
4 void ab initio. The alleged lien arising therefrom against the net sale proceeds is also
5 null and void.
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8 Furthermore, Section 549(a) provides the authority by which a trustee may
9 avoid post-petition transfers of estate property. In order for a Trustee to recover a
10 post-petition transfer of property of the estate pursuant to Section 549, four elements
11 must be satisfied: “(1) a transfer, (2) of property of the estate, (3) made after
12 commencement of the case, and (4) that is not authorized by the bankruptcy code or
13 by the bankruptcy court.” *In re Merry-G-Round Enter., Inc.* 400 F.3d 219 (4th Cir.
14 2005). The post-petition recording of the Mortgage was a “transfer” of estate property
15 within the broad meaning of Section 101 (54). See e.g. *In re Electric City, Inc.*, 43
16 B.R. 336, 342 – 43 (Bankr. W.D. Wash. 1984). Therefore, the unauthorized post-
17 petition transfer of estate property under the Mortgage should be avoided as a matter
18 of law.
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IV. REQUEST FOR RELIEF

WHEREFORE, the Trustee respectfully requests that the Court enter and order:

1. Granting the Trustee's Motion.
2. Finding that the recording of the Mortgage was a violation of the automatic stay and that any alleged lien against the net sale proceeds arising from the Mortgage is null and void.
3. That the transfer of the Bankruptcy Estate's Real Property by way of the Mortgage is avoided pursuant to Section 549.
4. For such other relief the Court finds necessary and just.

DATED this 12th day of April, 2022.

MUNDING, P.S.

/s/ John D. Munding.

John D. Munding, WSBA # 21734

Attorney for Chapter 7 Trustee